ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Policy and Rules Concerning the Interstate, Interexchange Marketplace	)	CC Docket No. 96-61
Implementation of Section 254(g) of the Communications Act of 1934, as amended	)	

JOINT REPLY COMMENTS OF THE GOVERNOR OF GUAM AND THE GUAM TELEPHONE AUTHORITY

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TABLE OF CONTENTS

SUMMARY

The Governor of Guam and GTA disagree with those Commenters who argue that the Commission should forebear from adopting rules requiring nationwide rate averaging. The Governor and GTA believe that the plain language of the Act commands the Commission to adopt rules. The Act's pro-competitive thrust does not require that the Commission forebear. Indeed, the Congress recognized and achieved the appropriate balance between a pro-competitive environment and the policy goal of equalizing the differences between high cost and low cost areas.

Moreover, the Governor and GTA believe that discussion of domestic satellites is misleading. The raison d'etre for previous Rate Integration efforts -- the advent of domestic satellites -- has nothing to do with the raison d'etre for new Rate Integration efforts -- the will of Congress. Furthermore, distance insensitivity is not the issue, the issue is cost. Guam is a high cost area. To exclude a high cost area from rate averaging because it is a high cost area is a flagrant departure from the purposes of Section 254 of the 1996 Act.

Once the inevitability of rules requiring rate averaging is accepted, there is a great deal of common ground among the parties. Agreement on flexibility and the need to promote and preserve a competitive environment is clearly evident from the Comments filed. There also seems to be agreement on the acceptability of promotions, discounts and competitive responses in general, subject to safeguards.

This fundamental agreement can be the foundation for the Governor's Working Group which will convene its first session on May 20 in Guam. Interested parties wishing to attend should contact the Governor's Special Advisor Robert F. Kelley at (671) 475-9323 or by fax at (671) 475-9329.

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JOINT REPLY COMMENTS

The Governor of the Territory of Guam ("Governor") and the Guam Telephone Authority ("GTA") hereby submit joint reply comments on Section VI of the above-captioned Notice of Proposed Rulemaking.[1] In this proceeding, the Federal Communications Commission ("FCC" or "Commission") asks for comment on implementing Section 254(g) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996.[2]

I. INTRODUCTION

A number of parties submitted Comments on rate averaging and rate integration issues. Several interexchange carriers ("IXCs") argue that the Commission should forebear from requiring that rate averaging principles be applied,

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[1] Notice of Proposed Rulemaking, FCC 96-123, March 25, 1996 ("Interexchange NPRM" or "NPRM").

[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act").

citing new Section 10 of the Communications Act. Those parties maintain that geographic rate averaging and rate integration are inconsistent with the development of competition and therefore would fall within the ambit of Section 10.[3] That Section requires the Commission to forebear from applying any regulation or provision of the Act to any carrier or service if the Commission determines that:

> *(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;*
>
> *(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and*
>
> *(3) forbearance from applying such provision or regulation is consistent with the public interest.*[4]

GTA believes that the provisions of Section 10 are conjunctive; that is, the Commission is required to forebear only if it makes all three determinations. None of the Commenters have shown that the Commission could, or should make those determinations. Moreover, under the principles of statutory construction, the Commission must look first to the plain language of the 1996 Act.[5] That language is not permissive. Indeed, according to the statute, the Commission shall adopt rules which shall require:

> *that a provider of interstate, interexchange telecommunications services shall provide such services to*

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[3] See, e.g., Comments of Sprint Corporation, p. 14.

[4] 47 U.S.C. § 160.

[5] See, e.g. Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980).

> *its subscribers in each State at rates no higher than the rates charged to its subscribers in any other State.*[6]

"Shall", the Supreme Court has stated, "is the language of command".[7] Clearly it is the will of Congress that citizens in Guam be treated no differently than citizens of any other State.

Interexchange carriers also argue that, if the Commission does not forebear from requiring rate averaging/rate integration, it should at the very least develop rules, consistent with existing policies, which provide flexibility in their application.[8] Some interexchange carriers suggest specific ways in which the rules can be made flexible and adaptable to a competitive environment.[9] As is discussed below, the Governor and GTA look forward to working toward ways to create a flexible, competitive environment.

Some parties suggest that, whatever the benefits of geographic rate averaging, it should not be extended to Guam because Guam falls outside the footprint of the domestic satellite facilities which provided the impetus for inclusion of other off-shore points in the geographically averaged national rate pattern.[10] One carrier specifically requests that inclusion of Guam within geographic rate averaging should be conditioned on the availability of competing distance insensitive satellite services.[11] The Governor and GTA disagree with this approach, as will be discussed below.

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[6] 47 U.S.C. § 254(g) (emphasis added).

[7] MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (1985), aff'd sub nom. MCI v. AT&T, 512 U.S. 618, 114 S.Ct. 2223, 129 L.Ed.2d 182 (1994), quoting Escoe v. Zerbst, 295 U.S. 490, 493, 55 S.Ct. 818, 820, 79 L.Ed. 1566 (1935)

[8] See, e.g., Comments of Sprint Corporation, p. 25.

[9] See, e.g., Comments of MCI, pps. 31-33; Comments of AT&T, pps. 33-41.

[10] See, e.g., Comments of Columbia Long Distance Services, Inc., pps. 4-7.

[11] Comments of IT&E Overseas, pps. 16-20.

Other parties recognize the benefits of rate averaging and rate integration, even in a competitive environment.[12] These parties generally support specific rules mandating rate averaging and rate integration and view those rules as statutory requirements. Generally, these parties are concerned about an enforcement mechanism to assure that interexchange carriers continue to be in compliance with the Commission's rules requiring rate averaging and rate integration. The Governor and GTA are in substantial agreement with these Commenters.

II. THE COMMISSION SHOULD ADOPT RULES TO REQUIRE RATE AVERAGING FOR ALL U.S. POINTS.

A. There is clear legislative intent supporting nationwide rate averaging.

The Governor and GTA believe that Congress has made it very clear that it does not want the Commission to forebear from requiring rate averaging on a nationwide basis. Indeed, the Joint Explanatory Statement accompanying the Telecommunications Act of 1996 states:

> *The conferees intend the Commission's rules to require geographic rate averaging and rate integration . . .*[13]

This is intended to ensure that subscribers in rural and high cost areas throughout the nation receive both intrastate and interstate interexchange service "at rates no higher than those paid by urban subscribers."[14]

Those commenters who claim that rate averaging is inconsistent with the pro-competitive thrust of the 1996 Act are mistaken about the kind of commitment

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[12] See, e.g., Comments of GTE, pps. 13-15; Comments of the State of Alaska, pps. 1-4; Comments of the Rural Telephone Coalition, pps. 1-3; Comments of the State of Hawaii, pps. 3-6; Comments of the United States Telephone Association, pps. 1-8; Comments of the Guam Public Utility Commission, p.2; Comments of the Commonwealth of the Northern Mariana Islands, pps. 7-11.

[13] Joint Explanatory Statement, p. 132.

[14] Id. (emphasis added).

to the marketplace evidenced by the Congress. To be sure, the 1996 Act is intended to promote competition. But it also is intended to protect the consumer. Total reliance on the marketplace to provide telecommunications service is tempered, for example, by specific requirements for Universal Service. Universal Service, like geographic rate averaging, is a social and political policy, not an economic model reflecting marketplace behavior.

Moreover, in considering Congressional intent on this matter, we should note that the rate averaging and rate integration requirements are included within the section on Universal Service. We believe the requirement should be considered in connection with the principle adopted in Section 254(b)(3):

> *Consumers in all regions of the Nation, including low income consumers and those in rural, insular and high cost areas, should have access to telecommunications and information services, including interexchange services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.*[15]

Congress knew what it was doing when it codified long-standing policy favoring rate averaging. It recognized the balance between a pro-competitive environment and the policy goal of equalizing the differences between high cost and low cost areas. Congress clearly intended that the Commission adopt rules requiring geographic rate averaging for all parts of the Nation including Guam.

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[15] 47 U.S.C. § 254(b)(3) (emphasis added). In Comments filed on April 12, 1996 in CC Docket No. 96-45, Federal-State Joint Board on Universal Service, GTA pointed out the relationship between this Universal Service principle and the requirements of Section 254(g), suggesting that, if necessary, Universal Service support mechanisms can be applied to support geographic rate averaging. In its Comments in CC Docket No. 96-45, AT&T Corp. made a similar comment. AT&T Comments at n.15.

B. Rate integration is a necessary corollary to nationwide rate averaging.

The Comments reflect some misunderstanding of the nature of rate integration and the legislative mandate. Rate integration is nothing more than the inclusion of off-shore points within the rate structure applicable on the Mainland.[16] Congress has now mandated both that rate structures shall include geographically averaged rates and that all States (as defined by the Communications Act to include Guam) be included.

Those commenters that argue that Guam cannot be included within geographic rate averaging rely too heavily upon the Joint Explanatory Statement's reference to the 1976 Rate Integration Policy.[17] They argue that since the raison d'etre for the 1976 Policy -- the advent of domestic satellites -- does not apply to Guam, then rate integration does not apply either. We do not believe that Congress intended the Commission to limit the applicability of rate integration only to Hawaii, Alaska and Puerto Rico/Virgin Islands. Had Congress intended this, it would not have included the broadly defined "State" within the definition of Section 254(g).

The Governor and GTA believe that the raison d'etre for the 1996 policy has nothing to do with domestic satellites and has everything to do with the will of Congress. A law has been passed mandating geographic rate averaging throughout the Nation. Nothing in the law limits that mandate only to those points that can be reached by domestic satellite.

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[16] See, e.g., Reply Comments of the State of Hawaii, File No. AAD No. 95-84 et al., September 14, 1995, p.3.

[17] The Joint Explanatory Statement states that the Conferees intend the Commission to incorporate the policies in the Commission's proceeding entitled "Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers between the United States Mainland and the Offshore Points of Hawaii, Alaska and Puerto Rico/Virgin Islands (61 FCC 2d 380 (1976))". The Congress does not specifically state which policies, or how those policies are to be incorporated. However, directly after mentioning the 1976 Policies, the Joint Explanatory Statement mentions that the Commission has permitted non-averaged rates in specific circumstances.

Moreover, commenters emphasis on domestic satellites, which do not provide service to Guam, is misleading. Commenters argue that because domestic satellites are distance insensitive, they offer an economic basis for inclusion within the rate averaging scheme. But INTELSAT satellites, which do provide service to Guam, are also distance insensitive. So, distance insensitivity is not the real issue; the real issue is cost. The fact is that it costs more to provide service to Guam. Guam is a high cost area. The whole purpose of rate averaging -- dating from its earliest days before domestic satellites and extending to the 1996 Act -- has been to ensure that consumers in high cost areas receive service at rates no higher than those paid by consumers in low cost areas. To exclude an area because it is high cost is a flagrant departure from the 1996 Act.[18]

In sum, the Governor and GTA believe that the 1996 Act requires the Commission to adopt rules mandating rate averaging for all U.S. states as defined by the Communications Act. For Guam, rate averaging is no longer a question of "whether", it is now a question of "how".

III. THE COMMISSION SHOULD ADOPT FLEXIBLE RULES THAT CAN WORK IN A COMPETITIVE ENVIRONMENT.

A number of commenters, even those that oppose nationwide rate averaging in a competitive environment, recognize that the legislation seems to require the adoption of rules. They ask that these rules be flexible to accommodate the needs of the marketplace.

The Governor and GTA agree. In our comments, we said:

> We do not believe that the 1996 Act was intended to reduce or eliminate all pricing flexibility, particularly in view

[18] In its Comments, Columbia maintains that rate averaging depends upon the means used to reach locations. Comments, p.3. Our research has uncovered no such requirement.

of the increased level of competition anticipated in the Act.[19]

In our view, a rate structure that offers geographically averaged rates provides a kind of "safety net" for consumers. There should always be available a Message Telecommunications Service rate that is geographically averaged. Similarly, there should always be available a private line rate that is geographically averaged. But there can also be calling plans, promotions and discounts -- subject to the conditions identified in our Comments.[20] There can also be services that are not provided on a geographically averaged basis. However, a service provider should not be permitted to offer an otherwise nationwide service that deliberately excludes Guam or any other high cost area.

Moreover, a transition period for the full implementation of geographic rate averaging is not at all unreasonable. There will likely be some network reconfiguration, billing and other issues that will need to be addressed.[21] The Governor and GTA believe that a phased approach to nationwide rate averaging for service to Guam is acceptable -- provided that the transition begins very soon and is

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19 Joint Comments, p.7.

20 Id. See Joint Explanatory Statement, p.132 ("The Conferees are aware that the Commission has permitted interexchange providers to offer non-averaged rates for specific services in limited circumstances (such as services offered under Tariff 12 contracts), and intend that the Commission, where appropriate, could continue to authorize limited exceptions to the general geographic rate averaging policy using the authority provided by Section 10 of the Communications Act.").

21 With regard to network reconfiguration, we believe it possible that mandated rate integration may incentivize carriers to find the lowest cost facilities and may put pressure on facilities providers to lower their rates. In that connection, the Commission should be reminded of its decisions, made in connection with the original Rate Integration Policies, that permitted Comsat to offer discounted transponder service to Hawaii. While the circumstances are not identical, those decisions do provide evidence of creativity on the part of facilities providers. See, e.g., American Telephone & Telegraph Co. et al. 53 FCC 2d 1078 (1975).

completed coincident with Guam's inclusion within the North American Numbering Plan.[22]

These views are generally consistent with the views of several other commenters. For example, MCI proposes certain conditions that it believes can accommodate

> . . .the tension -- indeed, potential serious conflict -- between the rate-averaging requirement and the desire for effective competition. . .

The Governor and GTA believe that proposals like MCI's, similar in many ways to those advanced in our Joint Comments, form an excellent basis to consider ways to achieve balance between the social and political goals evidenced in Section 254(g) and the overall mandate to develop competition in the provision of telecommunications services.

IV. THE GOVERNOR'S WORKING GROUP CAN HELP THE COMMISSION DEVELOP RULES.

It is comforting to realize that there is a great deal of common ground among the parties, once the inevitability of rules requiring rate averaging is accepted. Fundamental agreement on flexibility and the need to promote and preserve a competitive environment is clearly evident from the Comments filed. Additionally, there appears to be agreement on the acceptability of promotions, discounts and competitive responses to pricing changes in general. Further, agreement on some kind of safeguards similar to those proposed in our Joint Comments may be achievable. Finally, agreement in principle on the desirability of a transition period seems likely.

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[22] In that connection, it should be noted that, as described in its Comments in CC Docket No. 96-45, GTA is committed to conversion to cost-based access charges, as a corollary to full rate integration.

This fundamental agreement can be the foundation for the Working Group proposed to be convened by the Governor of Guam It is our confident belief that the Working Group can help the Commission develop rules by exploring areas of mutual agreement and proposing language to address those areas. Where there is no consensus, the Working Group will report a summary of issues to the Commission without a recommendation.

The Governor has proposed convening the Working Group in full recognition that achieving consensus on all issues is not likely. We are not naive in our understanding of the difficulties. However, the Governor believes that if it is possible to put before the Commission even one area of mutual agreement, the effort will be worthwhile. Our reading of the Comments suggests that consensus can be achieved -- not just on one, but on many issues -- if the parties will participate in good faith.

Invitations to come to Guam to attend the first Working Group meeting are being sent to parties interested in rate integration for Guam. The meeting will be held May 20 through May 22 at the Governor's Conference Room at Adelup, Guam. A second session of the Working Group is planned for Washington, D.C. on June 10 through 12, to be held at the Hall of States, 444 North Capitol Street, N.W. It is anticipated that the Chair of the Working Group will be the Governor's Special Advisor Robert F. Kelley, who can be reached at (671) 475-9323 or by fax at (671) 475-9329 by parties wishing to participate in the Working Group.

We recognize that the Commission is under a deadline of August 8 to adopt rules mandating geographic rate averaging, as well as rate integration. The Governor's Working Group is not intended in any way to intrude upon the Commission's efforts to meet that deadline. Rather it is our hope to report to the Commission on areas of success -- and failure -- so that the rules can incorporate the progress made by the Working Group.

V. CONCLUSION

The Governor and GTA are somewhat disappointed, but not surprised, that some parties continue to argue about "whether" Guam can be included in rate averaging. The issue is not "whether", it is "how". Once we turn to that question, we are comforted to realize that there is considerable agreement. In particular, and most importantly, there is agreement on the need to fashion rate averaging rules that will accommodate a competitive marketplace.

We believe the Governor's Working Group can make significant progress on achieving consensus.

Respectfully submitted,

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Guam Telephone Authority

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Its Attorney

May 3, 1996

CERTIFICATE OF SERVICE

I, Gail M. Mullen, do hereby certify that a copy of the foregoing Joint Reply Comments of the Governor of Guam and the Guam Telephone Authority, was sent by first class United States mail, postage prepaid, or by hand delivery or facsimile where indicated by an asterisk (*), this 3rd day of May, 1996, to the following:

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